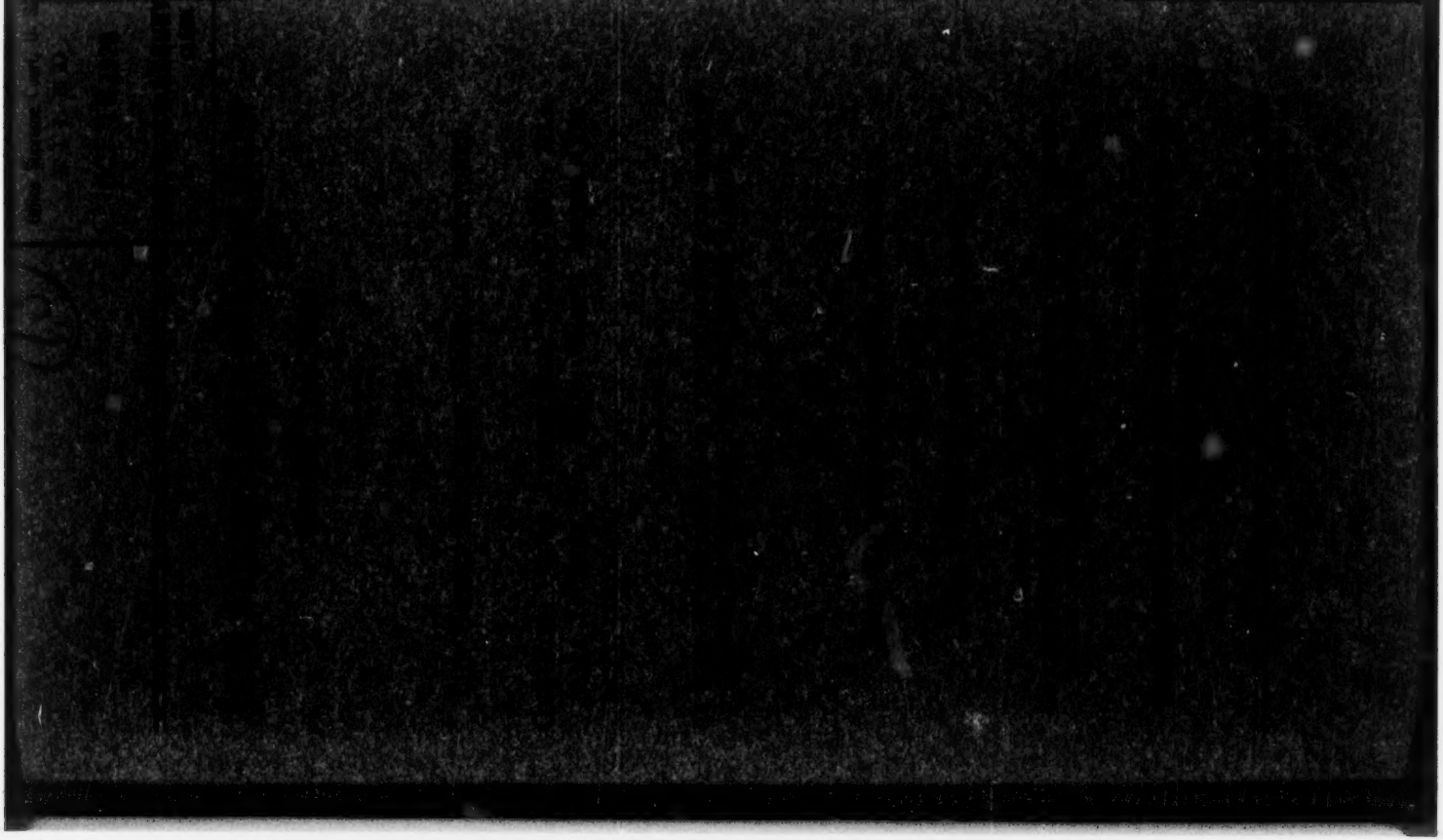

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AUTHORITIES CITED

14958—26——1

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 115

THE UNITED STATES OF AMERICA, PETITIONER

v.

ONE FORD COUPE AUTOMFBILE, No. 4776501, ALABAMA License No. 10978, Garth Motor Company, claimant

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 173

PORT GARDNER INVESTMENT COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

OPINIONS BELOW

In No. 115, *The United States* v. *One Ford Coupe*, the opinion of the Circuit Court of Appeals (R. 14)

is reported in 4 F. (2d) 528. In No. 173, *Port Gardner Investment Company* v. *The United States,* there is no opinion below, as the case was certified.

JURISDICTION

In No. 115, the *Ford Coupe case,* the judgment of the Circuit Court of Appeals was entered February 27, 1925. (R. 17.) On May 25, 1925, the United States applied for a writ of certiorari under Section 240 of the Judicial Code. The writ was granted June 1, 1925.

No. 173, the *Port Gardner Investment Company case,* is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Without attempting to present anything not covered by the briefs already filed, it is not out of place on reargument to make a summary review of these cases.

Both cases deal with liquor illicitly distilled. In each case the United States seeks forfeiture of the automobile in which the illicit spirits were being removed and transported, under the provisions of Section 3450 of the Revised Statutes, which provides for the forfeiture of a vehicle used to remove and conceal goods or commodities on which a tax has been imposed, with intent to defraud the Government of the tax.

In the *Port Gardner case* it appears that the man using the automobile to transport the illicit liquor was arrested, charged with possession and transportation of intoxicating liquor in violation of the National Prohibition Act, pleaded guilty and was sentenced to pay a fine, and that the Government then sought forfeiture of the automobile under Section 3450 of the Revised Statutes, under which the interests of innocent parties are not saved, instead of under Section 26 of the National Prohibition Act, under which innocent interests are not forfeited.

In the *Ford Coupe case* the record does not disclose that any individual had been prosecuted or convicted either for violation of the National Prohibition Act or for the offense of attempting to defraud the United States of taxes under Section 3450 and the accompanying sections of the Revised Statutes. The record does not affirmatively show that no such prosecution was had. It is silent on the subject.

The motion to quash the libel in the *Ford Coupe case* (R. 5) does not plead a conviction under the National Prohibition Act as a bar to the forfeiture under Section 3450.

THE QUESTIONS PRESENTED

Each case presents the question whether there is such direct conflict between the National Prohibition Act and Section 3450 of the Revised Statutes [or any other provision of law on which forfeiture

by Section 3450 depends] as to make Section 3450 [which provides for forfeiture of a vehicle used in removing merchandise for the purpose of defrauding the United States of the taxes thereon] inoperative in cases where illegally distilled liquors, on which no tax has been paid, are being removed. In that connection the question arises whether there is any tax on liquors illicitly distilled, within the meaning of Section 3450. A question of secondary importance—which arises only in the *Port Gardner Investment Company case,* No. 173—is whether the conviction of the individual using an automobile for illegally transporting liquor in violation of the National Prohibition Act is a bar to any proceeding by the United States to forfeit the vehicle under Section 3450 and requires the United States to proceed, if at all, to forfeit the vehicle under Section 26 of the National Prohibition Act. If a forfeiture may be had under Section 3450 for use of a vehicle to evade a tax on illicitly distilled liquor, the interests of innocent persons in the vehicle are not saved. If Section 26 of the National Prohibition Act is the only applicable provision for forfeiture of the car, the interests of those who are innocent are not forfeited.

THE STATUTES

The principal statutes involved are set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

I. By the Supplemental Act of November 23, 1921, Congress disclosed an unmistakable intention

to maintain in operation with respect to spirits illegally distilled in violation of the National Prohibition Act all laws imposing or regarding taxes on spirits produced in the United States and all laws imposing penalties for nonpayment or evasion, except to the extent the old laws are in direct conflict with the National Prohibition Act.

The Revenue Act of 1918, amended in 1921, imposing a tax on all spirits thereafter produced, is a law regarding taxes on liquors, and Section 3450 of the Revised Statutes, providing for forfeiture of vehicles used to remove taxed articles to defraud the revenue, is a law providing a penalty for evasion of a tax within the meaning of Section 5 of the Supplemental Act.

There are, and have been since the Supplemental Act, what are in truth taxes imposed on liquor illegally distilled, and there are additional imposts on such liquor which are penalties, but which Congress has treated as taxes. There are, therefore, taxes on illicitly produced liquor within the meaning of Section 3450 of the Revised Statutes authorizing forfeiture of vehicles used to remove taxed articles to defraud the revenue.

There is no direct conflict between the forfeiture provisions in Section 3450 and those in Section 26 of the National Prohibition Act. The test of direct conflict is whether proof of facts justifying forfeiture under Section 26 would in all cases establish ground for the more severe forfeiture authorized by Section 3450. Different offenses are involved and

different proof is required. Proof of one offense authorizes forfeiture of guilty interests under Section 26. If to this is added proof of other facts, establishing the additional offense of tax evasion, the more severe forfeiture under Section 3450 results. Each is operative within its field, and they are not in direct conflict.

II. Conviction of the man in charge of the vehicle for unlawful transportation under the National Prohibition Act does not confine the United States to forfeiture of guilty interests and is not a bar to forfeiture under Section 3450, if tax evasion is added to illegal transportation. If conviction of the individual under one statute bars proceedings *in rem* for forfeiture under the other, it must be because the statutes directly conflict or because it is so provided by their terms. The provision in the Supplemental Act that a conviction under one statute shall be a bar to prosecution for the same act under the other statute relates only to convictions and prosecutions of the individual and not to proceedings *in rem*. A conviction of the individual for the crime of tax evasion under Section 3450 bars prosecution of the individual for illegal transportation under the National Prohibition Act, and therefore would prevent summary forfeiture proceedings under Section 26 of the latter Act, because conviction of the individual is a condition precedent to summary forfeiture under Section 26, but the converse is not true, because, while conviction under the National Prohibition Act bars prosecution of

the individual under Section 3450, conviction of the individual under Section 3450 is not a condition precedent to forfeiture of the vehicle thereunder.

The provision of Section 26 that after the conviction of a person arrested for illegal transportation the court *shall* proceed to summary forfeiture thereunder does not prevent calling into operation the forfeiture provisions of Section 3450 if the facts justify it. The two may be joined and the severer or milder forfeiture may result, depending upon the facts. The purpose of the provision in the Supplemental Act against double convictions was intended to prevent two punishments of the individual for the same act. There is no double punishment of the individual, nor double punishment of the vehicle, if the forfeiture under Section 3450 occurs. Under Section 26 part of the value of the vehicle is forfeited and under Section 3450 the remainder of its value may be forfeited. The same value is not twice lost to anybody.

ARGUMENT

I

THERE ARE TAXES IMPOSED BY LAW ON LIQUOR ILLICITLY DISTILLED, WHICH ARE TAXES WITHIN THE MEANING OF SECTION 3450, REVISED STATUTES, AND THERE IS NO DIRECT CONFLICT BETWEEN THAT SECTION AND SECTION 26 OF THE NATIONAL PROHIBITION ACT

Section 35 of the National Prohibition Act provided that Acts inconsistent were repealed only to the extent of the inconsistencies, and in other re-

spects the National Prohibition Act should be construed as in addition to existing laws, and it provides:

> This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

After its passage much conflict arose in the lower Federal courts as to whether any tax was imposed on liquor illegally distilled, and whether the provisions of law providing penalties or forfeitures for nonpayment of taxes remained in effect as to liquor distilled in violation of the National Prohibition Act.

In *United States* v. *Yuginovich*, 256 U. S. 450, decided June 1, 1921, this Court considered an indictment obtained after the passage of the National Prohibition Act, in which the defendants were charged with unlawfully engaging in the business of distillers and in distilling spirits and with defrauding the United States out of the tax on spirits and with failing to keep its distillery marked and operating it without giving bond, in violation of

various sections of the Revised Statutes, and the Court said (p. 464) that although, by Section 35 of the National Prohibition Act, Congress "manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act." Thereupon Congress enacted Section 5 of the Supplemental Act of November 23, 1921 (C. 134, 42 Stat. 222, 223), which provided:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

The Committee on the Judiciary of the House, in its Report on the Bill, said:

> Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect

> held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater necessity for such control at this time. *There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes.* During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law. (Italics ours.) [Report No. 224, House of Representatives, 67th Cong., 1st Sess.]

Following that came the decision of this Court in *United States* v. *Stafoff*, 260 U. S. 477, arising after the passage of the Supplemental Act of November 23, 1921, and decided January 2, 1923. There Stafoff was indicted for having in possession a still intended for the production of distilled spirits without having registered it with the Collector of Internal Revenue and with having unlawfully manufactured spirits other than in an authorized distillery, contrary to the provisions of the

statutes. The Court, referring to the House Report, above cited, and to the Supplemental Act of November 23, 1921, recognized that Congress by the Supplemental Act intended not only to keep in effect taxes on liquor illegally distilled, as well as on that legally distilled, but to keep in effect the provisions of the Revised Statutes imposing penalties for failure to pay the taxes or for defrauding the United States of the revenue. It can not be doubted that Congress intended to impose what it called and considered taxes on whiskey illegally distilled and to renew as operative and applicable to illegally distilled liquors all of the laws "in regard to the manufacture and taxation" of liquor as well as "all penalties for violations of such laws." The only qualification in the Supplemental Act relating to such provisions of the statutes in force at the time of the National Prohibition Act is as to those which "are directly in conflict" with any provisions of the National Prohibition Act, and the question here is whether there is any direct conflict between the National Prohibition Act and Section 3450 or any other provisions of law on which forfeiture by Section 3450 depends. The section of the Revenue Act of 1918, amended in 1921, imposing taxes on "spirits that have been or that may be hereafter produced," was a law in regard to the taxation of intoxicating liquor, kept in effect by the Supplemental Act. It applied by its terms to liquor illegally produced as well as to that legally produced, and the Report of the Judiciary Com-

mittee does not permit of doubt that Congress intended to impose those taxes on spirits illegally produced. The tax is on the product, not on the act of producing it.

Section 3450 of the Revised Statutes, providing for forfeiture of vehicles used in removing or concealing merchandise with the intent to defraud the United States of the taxes thereon, is a law imposing penalties for violation of the laws relating to taxation of liquor within the meaning of the Supplemental Act. True, Section 3450 does not relate exclusively to taxes on intoxicating liquor, but the Supplemental Act does not provide that only the laws relating exclusively to liquor are retained in operation.

There is no direct conflict between the provisions of the Revenue Laws imposing taxes on all distilled spirits and the provisions of the National Prohibition Act. Such direct conflict as did exist was removed by Section 35 of the National Prohibition Act, which provided that no stamps should be sold in advance for the taxes on distilled liquor. That taxes were to be levied on spirits illegally distilled was expressly recognized by Section 35 of the National Prohibition Act.

The Revenue Act of 1918 imposed a tax of $2.20 per gallon on all spirits "now in bond or that have been or that may be hereafter produced" in the United States. It made no distinction between legal and illegal distillation. Spirits, fit, though not intended for beverage use, have been distilled

lawfully under the provisions of the Prohibition Act.

Section 3248 of the Revised Statutes provides that "the tax shall attach to this substance as soon as it is in existence as such."

Section 3251 of the Revised Statutes places a lien on the liquor for the amount of the tax. (Judge Denison overlooked this in 5 F. (2d) 1.)

The Revenue Act of 1918 provided for an increase in this tax from $2.20 to $6.40 per gallon if withdrawn for beverage purposes.

Section 35 of the National Prohibition Act, thereafter enacted, expressly provided that the Act should not relieve anyone from paying any taxes imposed by law upon the manufacture or traffic in liquor, and, having reference to the Revenue Act of 1918, provided that the person responsible for illegal manufacture should pay a tax "in double the amount now provided for by law," with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

The National Prohibition Act left in effect, therefore, the basic tax of $2.20 per gallon, which was a true tax on the product legally or illegally distilled, and added to it what Congress called a tax—but which amounts to a penalty for infraction of the law—an additional amount equal to the original tax plus some specific penalties, which were called such.

The Revenue Act of 1921 kept in force the abovementioned tax provisions of the Act of 1918 and

added to it a proviso that if the basic tax of $2.20 per gallon had been paid and the spirits were thereafter diverted to beverage purposes there should be an additional tax of $4.20. The proviso was intended to deal with cases where the beverage rate of $6.40 had not been collected in the first instance.

We have in effect a law imposing a tax of $2.20 per gallon on all spirits distilled, whether legally or illegally distilled, laws making distillation illegal in some cases and legal in others, and other laws which provide for doubling that tax in case of illegal distillation or diversion, which are called taxes by Congress and were understood by it to be such, although intrinsically penalties. That the basic tax of $2.20 per gallon is a tax and not a penalty is clear. When we deal with so-called taxes on articles which may not lawfully be produced under any conditions, or increased taxes on account of illegality, we are in another field. We do not question that the penalties of $500 and $1,000 imposed by Section 35 are penalties for infraction of law, nor that the doubling of the tax, because of infraction of law, may be considered a penalty; but a tax on a certain article which may be legally or illegally produced, and which applies to all the articles of the class regardless of their origin is not a penalty as to those articles which are manufactured without compliance with law. Such a tax on articles illegally produced is not imposed because of illegality but despite it.

The discussion of the decisions of this Court relating to what are penalties and what are taxes in the opposing briefs goes beyond the necessities of this case.

In *Trusler* v. *Crooks,* 269 U. S. 475, it appeared that under the guise of a tax Congress was attempting to regulate transactions reserved to the police power of the States, because the amount of the alleged tax was two hundred times the amount of the consideration of the taxed transaction and resulted in absolute prohibition. The importance of determining there whether there was a true tax or penalty was because of the necessity of giving effect to the division of power between the State and Federal governments. Similar necessity for determining whether a tax or a penalty was imposed has arisen in other cases.

In *Regal Drug Company* v. *Wardell,* 260 U. S. 386, it was necessary to determine whether the imposts were intrinsically penalties or taxes, because, if penalties, the method of collection violated the due process clause of the Constitution. Here no such considerations are involved. Congress has power to regulate the liquor traffic, and a regulation under the guise of the tax is not objectionable for that reason, and there is no question of due process of law, or administrative enforcement of penalties, here presented. The only reason for inquiring whether there are taxes or only penalties imposed upon liquor illicitly distilled is to ascer-

tain whether there is a tax within the meaning of Section 3450 authorizing forfeiture of the vehicle used in moving the commodity to avoid the tax. It is a question of the intent of Congress, and it is unimportant whether the imposts are true taxes or inherently penalties if Congress has intended to have them treated as taxes within the meaning of that word as it is used in Section 3450. There is no question of due process of law as against the innocent owner of the automobile. *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505.

In the case of use of a vehicle for evasion of taxes, the forfeiture of innocent interests under Section 3450 has always involved a forfeiture of property of an innocent person, and that condition is not aggravated if the liability, the evasion of which results in the forfeiture of the vehicle, is itself imposed in the nature of a penalty.

The basic tax of $2.20 per gallon is a true tax on liquor legally or illegally distilled, and is a tax within the meaning of Section 3450. The additional imposition of $4.20 per gallon on spirits withdrawn for beverage purposes imposed by the Revenue Act and the doubling of the tax by Section 35 of the National Prohibition Act, while they may inherently be penalties for infraction of law, are labeled taxes by Congress, treated as taxes by it, and the legislative intent is clearly disclosed that they shall be considered taxes within the meaning of the word "tax" as used in Section 3450 and other statutes. They are liabilities of the distiller

and liens upon the liquor itself. It is sufficient, without going that far, to bring into operation Section 3450 that a basic tax of $2.20 is imposed, which is inherently a tax and not a penalty.

Whether we treat half of the doubled tax as imposed by the Revenue Act and the other half as a penalty added by Section 35 of the National Prohibition Act, on account of illegal distillation, or whether we treat the entire impost as one laid by Section 35 as a substitute for the tax levied by Section 600 of the Revenue Act, is immaterial. In either case, *to the extent the impost does not exceed that on lawfully distilled liquor,* it is not imposed because of infraction of law, and is a true tax, not a penalty. Neither in *Lipke* v. *Lederer,* 259 U. S. 557, nor in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, did the Court have occasion to do more than hold certain imposts to be penalties, which were imposed only on illegal transactions and because of the infraction of law.

The remaining question is whether there is a direct conflict between Section 26 of the Prohibition Act, relating to forfeiture of vehicles for illegal transportation, and Section 3450 of the Revised Statutes, which provides for forfeiture of vehicles used to remove articles with intent to defraud the revenue. There is no direct conflict, because different offenses are involved, and different evidence must be produced to effect a forfeiture under Section 3450, from that sufficient under Section 26.

The test of direct conflict is whether the facts establishing a violation of the National Prohibition Act, leading to forfeiture under Section 26 of that Act, necessarily make out a violation of Section 3450. If so, there would be a direct conflict, because in that case the limited forfeiture of guilty interests provided for in Section 26 would never be operative, since proof of the offense necessary to forfeit under Section 26 would automatically produce the unlimited forfeiture under Section 3450. But that is not the case. It is too evident for discussion that proof leading to forfeiture under Section 26 of the National Prohibition Act may, and in many cases would, fall short of establishing ground for forfeiture under Section 3450.

At the time of the passage of the National Prohibition Act large quantities of distilled spirits lawfully distilled were in bonded warehouses, to which the tax had attached, but which had not been paid. The time limit on payment of such taxes was entirely removed by the Revenue Act of 1918, and large quantities of lawfully distilled spirits to which taxes have attached and are unpaid are still in the United States, some of which may be transported in violation of the National Prohibition Act. In addition to that, intoxicating spirits fit, though not intended, for beverage purposes have been lawfully distilled under permit and supervision of the Treasury Department since the enactment of the National Prohibition Act and are subject to true taxes. It has never been suggested

that an automobile used to remove or conceal such legally distilled liquors, for the purpose of defrauding the revenue, could not be forfeited under Section 3450 merely because they are being transported in violation of the Prohibition Act. To hold, in the case of removal or transportation of spirits illegally distilled, that the vehicle used may only be forfeited under Section 26 of the National Prohibition Act, while in the case of legally distilled liquor Section 3450 may be resorted to, is to hold that where the crime of tax evasion is preceded by the offense of illicit distillation, a less severe forfeiture is inflicted than if tax evasion alone were involved. This consequence, which would flow from a conclusion adverse to the Government in these cases, would be in direct conflict with the intention of Congress as disclosed in the statutes and the Congressional Record.

II

CONVICTION OF ILLEGAL TRANSPORTATION UNDER THE NATIONAL PROHIBITION ACT OF THE INDIVIDUAL USING A VEHICLE TO TRANSPORT DOES NOT BAR PROCEEDINGS IN REM UNDER SECTION 3450 FOR FORFEITURE OF INNOCENT AS WELL AS GUILTY INTERESTS IN THE VEHICLE

The doctrines relating to election of remedies in civil suits have no application here. They relate only to choice of remedies to enforce a single right or correct a single wrong. Here there were two distinct offenses committed and to be punished.

If conviction of the individual for one offense bars proceedings *in rem* for forfeiture of the article under the other statute, it must be because the statutes directly conflict or because it is so provided by their terms. That there is no direct conflict between Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Act has been discussed above. The two provisions of law referred to as supporting the claim that prosecution under one statute bars forfeiture of the car under the other are the provision in Section 5 of the Supplemental Act of November 23, 1921, that "if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other," and the provision in Section 26 of the National Prohibition Act, which provides that, after the individual using a vehicle is convicted of illegal transportation, "the court upon conviction of the person so arrested" *shall* order a sale of the car and a distribution of the proceeds, protecting the rights of innocent interests and lien holders.

The provision in Section 5 of the Supplemental Act relates to convictions of individuals and prosecutions of individuals, and the language of the provision does not justify the view that a conviction of the individual under one Act should bar a proceeding *in rem* for forfeiture under the other. Conviction of the individual for tax evasion under Section 3450 is a bar to prosecution of the individual

for illegal transportation under the National Prohibition Act, and as conviction of the individual under the National Prohibition Act is by the terms of Section 26 of that Act a condition precedent to summary forfeiture under Section 26 it follows that a conviction of the individual under Section 3450 does prevent the summary forfeiture provided for by Section 26; but this is of no consequence, because if the Government has at hand the evidence to convict the individual under Section 3450, it is readily able to proceed to forfeit the car, including the interests of innocent persons therein, under Section 3450.

The contrary is not true. A conviction of the individual for illegal transportation under the National Prohibition Act may bar a prosecution of the individual for tax evasion under Section 3450, but as conviction of the individual under Section 3450 is not a condition precedent to forfeiture of the vehicle under Section 3450, conviction of the individual under the National Prohibition Act does not bar proceedings *in rem* under Section 3450.

It is suggested that if a prosecution of the individual, followed by conviction, occurs under the National Prohibition Act the court must go on and conduct the summary forfeiture proceedings under Section 26, as the language of that section is mandatory and there is no way to stop the proceedings under Section 26 after the conviction occurs; and the argument is made, if this be so, that proceedings under Section 26 must be had and

that Section 3450 may not be invoked. The defect in this reasoning is in assuming that because proceedings are being conducted under Section 26, the Government can not interpose under Section 3450 additional reasons for forfeiting not only the guilty interests but the innocent interests in the automobile. If one offense results in forfeiture of the guilty interests and another offense results in the forfeiture of the innocent interests in the vehicle, there is nothing to prevent joinder of the two claims in one proceeding; and if the Government stops short with proof justifying only forfeiture of the guilty interests, that relief may be granted, and if additional proof is offered showing an additional offense requiring forfeiture of the innocent interests the decree may be entered accordingly.

When we consider that proceedings *in rem* under Section 3450 may be had, and a car forfeited without any prior prosecution or conviction of the individual, and that a subsequent conviction under the Prohibition Act of the individual could not be then followed by forfeiture under Section 26, because no car would be there to forfeit, the correctness of these contentions is confirmed.

If forfeiture proceedings under Section 26 are under way, or even if the car has been sold and the proceeds are awaiting distribution, the Government may intervene by libel *in rem* against the car or its proceeds, under Section 3450 and ask that the entire value of the car be forfeited. Such a

joinder of the two claims is disclosed in *United States* v. *385 Barrels of Wine,* 300 Fed. 565 (United States District Court for the Southern District of New York, June 5, 1924).

In dealing with the claim that offenses charged in two articles were one and the same offense, the Court said in *Carter* v. *McClaughry,* 183 U. S. 365, 394:

> The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made," which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference.

The Court quoted with approval the following from *Morey* v. *Commonwealth,* 108 Mass. 433:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof

> of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

While the court was there dealing with double jeopardy, which is not here involved, its statements are instructive in determining whether there is any conflict between Section 26 and Section 3450. The quotations from that opinion afford an explanation of the provision in Section 5 of the Supplemental Act that conviction under one statute shall bar a prosecution for the same act under the other statute. Double jeopardy under the Constitution would not exist in this case, because there are two distinct offenses, and that is why Congress put this provision in Section 5. Its purpose was to prevent double punishment of the individual and two fines or two sentences of imprisonment inflicted upon one individual for a single act which might constitute an offense under two statutes. As to Section 3450 and Section 26, we can consider them as both operative within their respective fields; they do not in any case produce a double punishment upon an individual. Neither do they produce double loss of property. The interest of the guilty person in the automobile is forfeited in either case, and the remaining interests of innocent persons in the automobile not forfeited for violation of the National Prohibition Act may be forfeited in a proper case under Section 3450. There is no double pun-

ishment for the same act and no double fine or loss on any interest.

CONCLUSION

If the views herein expressed are sound, the judgment in *United States* v. *One Ford Coupe* should be reversed, and all the questions in the *Port Gardner case* should be answered in the affirmative except the Fifth, which should be answered in the negative.

As to question Three, it may be said that Section 3251, R. S., imposes a lien on the liquor for the tax, and its concealment or removal by anyone with notice that the tax is unpaid, defrauds the revenue. Section 3450 has never been limited to the initial movement from a lawful place of storage or from the place of manufacture. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *Commercial Credit Co.* v. *United States,* 5 F. (2d) 1.

The other view would mean that no one who participates in the concealment or movement to defraud the United States would be guilty under Section 3450 unless a party to the first movement, and no vehicle used may be forfeited unless the "initial carrier."

The lower Federal courts have shown a reluctance to adopt these views. This attitude seems to have resulted from a repugnance to treating as a tax, a liability which can not be paid without disclosure of a violation of law, and to a feeling that the law primarily in mind in the transporta-

tion of illicit liquor is the Prohibition Act and not the revenue laws.

It is enough to say that Congress must have had these considerations in mind, has deliberately laid them aside, and plainly directed that the tax laws and their penal provisions may be resorted to as a means to aid in the enforcement of prohibition.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Chief Attorney.

OCTOBER, 1926.

APPENDIX

Section 26, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 315):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the

sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 35 (p. 317):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This

Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Act of November 23, 1921 (Supplemental Act), c. 134, 42 Stat. 222, 223, Sec. 5:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a

conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Section 3450 of the Revised Statutes:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of

this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Section 600(a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1105:

> That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law.

Section 600 of Title VI of the Revenue Act of 1921, c. 136, 42 Stat. 227, 285:

That subdivision (a) of section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided*, That on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion."

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